Supreme Court, U.S.
FILED
MAY 8 1994
OFFICE OF THE CLERK

(2)

Case No. 93-1618

IN THE

Supreme Court of the United States

October Term, 1993

GARY G. GRAHAM and CHRISTOPHER LITRAS,
Petitioners,

v.

ROBERT A. BUTTERWORTH,
State of Florida Attorney General, and
BRADLEY E. KING,
State Attorney for the Fifth Judicial Circuit,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower courts' decisions that a prosecutorial and judicial determination that a challenged statute does not apply to a judicial candidate's undisputed action are wholly consistent with Supreme Court jurisprudence in extinguishing a case or controversy and mooting the putative First Amendment claim.

2. Whether the Eleventh Circuit's decision that petitioners lack overbreadth standing is consistent with Supreme Court jurisprudence.

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§ 105.071(11), Fla. Stat. . . . . *passim*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief in opposition to the petition for writ of certiorari establishes that the declaration petitioners seek is not available to them. Despite being told repeatedly that petitioner Graham's activities are not within the scope or coverage of the subject Florida statute, Fla. Stat. § 105.071(11), petitioners continue to press their claim for a declaration that this statute does indeed apply to them and that this law should therefore ultimately be stricken as violative of the First Amendment.

A reading of the two decisions appearing in the Appendix to the Petition for Writ of Certiorari demonstrates that both courts relied on clearly established precedent of this Court in holding that there ultimately was no live case or controversy, petitioners therefore lacked standing, and hence the case was and remains moot.

Moreover, the Eleventh Circuit's decision in the instant cause clearly distinguishes its prior decision in *ACLU v. The Florida Bar,* 999 F.2d 1486 (11th Cir. 1993) and, therefore, there exists no intracircuit conflict because of the determination early on that the statute does not apply to petitioner Graham's undisputed conduct.

STATEMENT OF THE CASE

On March 16, 1992, Graham and Litras filed their lawsuit against Robert Butterworth, State of Florida Attorney General, and Bradley King, state attorney for Florida's Fifth Judicial Circuit, seeking declaratory and injunctive relief against enforcement of Fla.Stat. § 105.071(11). Butterworth and King filed a motion to dismiss, which the district court denied on June 26, 1992. On July 20, 1992, both parties filed cross motions for summary judgment. On October 6, 1992, the district court denied Graham's and Litras's motion for summary judgment and granted Butterworth's and King's

motion for summary judgment, finding that the statute did not proscribe petitioners' intended conduct; thus, no actual threat of injury existed, and therefore, no case or controversy existed and petitioners lacked standing. The Eleventh Circuit Court of Appeals dismissed the appeal, agreeing with the district court that the subject statute did not regulate Graham's conduct, that Graham and Litras lacked standing, and that the action was moot.

The appeals court reached this determination from the undisputed facts as specifically found by the Court which are recited here because of Graham's and Litras's embellishment *de hors* the record.[1]

In 1990, Gary Graham was a candidate for the office of county court judge for Citrus County, Florida, and Christopher Litras, a resident of Citrus County, supported Graham in his campaign. As part of his campaign literature, Graham paid for the printing of 5,000 postcards reading: "I am supporting Judge Graham because: _____." The blank space allowed supporters to insert reasons for supporting Graham. Supporters would then mail the postcards to other voters to inform them of Graham's campaign. Each postcard stated: "Paid for by the campaign account of Gary Graham," denoting that it was a paid political advertisement. Graham, Litras, and other supporters distributed approximately 50 to 100 of these postcards in Citrus County.

During the campaign, Graham also received a number of unsolicited letters from area voters. With the written consent of the voters, Graham paid to have some of their

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1 "After the commencement of this litigation, for the first time, in an obvious attempt to avoid ruling on this constitutional challenge, respondents changed their position concerning the scope of the Florida Statute." Pet. pg. 5. This statement is pure opinion unsupported by the record; respondents based their interpretation on a reading of the statute, and not to avoid litigation.

letters reprinted in local newspapers as part of an advertisement for Graham's candidacy. Each advertisement stated: "Paid for by campaign account for Gary Graham," indicating that it was a paid political advertisement.

During the campaign in August of 1990, Charles Horn, Graham's opponent, publicly accused Graham of violating Florida Statute § 105.071(11). Fla.Stat. § 105.071(11) reads: "A candidate for judicial office shall not:...(11)Agree to pay all or any part of any advertisement sponsored by any person, group, or organization wherein the candidate may be endorsed for judicial office by any such person, group, or organization."

On August 27, 1990, Bradley King, State Attorney for the Fifth Judicial Circuit, which includes Citrus County, informed Graham that the distribution of the postcards and the publication of the letters of support violated the statute. Because the state attorney concluded that Graham did not have the requisite criminal intent to violate the statute, and Graham's opponent did not wish to have the grand jury investigate the incident, the state attorney took no further action.
5 F. 3d at 497-98.

REASONS FOR DENYING THE WRIT

I. The Lower Courts' Decisions That a Prosecutorial and Judicial Determination That a Challenged Statute Does Not Apply to a Judicial Candidate's Undisputed Action Are Wholly Consistent With Supreme Court Jurisprudence in Extinguishing a Case or Controversy and Mooting the Putative First Amendment Claim.

Petitioners' mootness argument is fatally flawed because it is wholly predicated on a faulty premise. Contrary to their protestations, the case *sub judice* does not involve "voluntary

cessation of allegedly illegal conduct" (pet. pg. 7) or an "official's promise to discontinue prosecutorial action" (pet. pg. 9) in the face of a viable prosecution. As demonstrated below, and as a reading of the lower court decisions unquestionably establishes, there is no "allegedly illegal conduct" precisely because the challenged statute does not apply to them. And because of this administrative and judicial determination of nonapplicability, petitioners' fear that the prosecutor can "return to his old ways" (pet. pg. 7) is illusory. Against this backdrop, both the district and appeals court relied on well established Supreme Court jurisprudence in rejecting the claims of Graham and Litras; in light of their claims as shown below, it is they who seek a departure from this Court's precedent.

By their petition, Graham and Litras seek to accomplish the following:

1. To have this Court rule that, in First Amendment actions, a case or controversy exists for all purposes and for all times throughout the litigation, regardless of intervening events, as soon as a prosecutor utters his or her early on belief that intended actions violate the law. In short, Graham and Litras urge this Court to treat as meaningless surplusage all subsequent prosecutorial declarations to the contrary and judicial declarations that the subject statute is inapplicable to them and their intended conduct.

2. To have this Court, based on the early declaration by State Attorney King, declare the statute applicable to

Graham for the express purpose of allowing him to press his (and Litras's) First Amendment claims.[2]

Graham and Litras contend that the Eleventh Circuit's decision establishes a dangerous precedent, immunizing government actions from constitutional scrutiny. Pet. pgs. 6 and 7. However, the lower court opinions clearly establish that there is no government action affecting petitioners that is being immunized; petitioners' actions simply do not implicate, or fall within the scope of, the statute.

In this light, it is the vitalization of their claim that would create a dangerous precedent by jettisoning well-settled federal case or controversy jurisdictional principles. This is so because petitioners want this Court to craft a right for a First Amendment plaintiff to litigate a claim on the merits in federal court solely on the basis of an early on erroneous interpretation of the law regardless of intervening events, including judicial interpretations that a questioned law does not affect petitioners.

This Court's precedent on case or controversy requirements establishes the correctness of the lower courts' opinions, and a reading of both decisions appended to the petition demonstrates without question that both courts relied exclusively on Supreme Court precedent in reaching their conclusions.

In *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241 (1937), this Court held that actions cognizable in federal court must involve substantive controversies, requiring action "between parties having adverse legal interests, of

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2 As footnote 2 of their petition makes clear, Graham and Litras continue to press for an interpretation of the subject statute that is contrary to that of the lower courts which, if vitalized, would permit them to maintain their constitutional challenge. See Appendix to Petition for a Writ of Certiorari, pgs. 9a, 16a-19a. As demonstrated in this brief, such an enterprise is not countenanced by our jurisprudence.

sufficient immediacy and reality" to justify granting relief. See also *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Of profound importance for the purpose of the case *sub judice* is that the *controversy must exist at all stages of the litigation. United States v. Munsingwear,* 340 U.S. 36, 39-40 (1950). (Emphasis added.) Such is not the case here.

Both courts below rely on *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 298 (1979) and *Flast v. Cohen,* 392 U.S. 83, 95, 99-100 (1968) in their respective case or controversy and standing analyses. *Babbitt* instructs that a " 'case or controversy' exists when the conflicting contentions of the parties ... present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Id.* It thus necessarily follows that, for a party to have standing to challenge a statute, that challenger must demonstrate "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." *Id.*[3]

In light of the fact that King (as well as Butterworth) early on and repeatedly represented that the challenged statute does not apply to Graham's and Litras's proposed conduct, and the lower courts have held that the statute does not apply to their intended activity, it is disingenuous for Graham and Litras to contend before this Court that Graham nevertheless presently fears prosecution under a statute which does not apply to him.

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3 The district court, in addressing case or controversy and standing, also relied on *Railway Mail Ass'n v. Corsi,* 326 U.S. 88, 93 (1945), *Baker v. Carr,* 369 U.S. 286, 204 (1962), *Steffel v. Thompson,* 415 U.S. 452, 458 (1974), *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982), and *City of Los Angeles v. Lyons,* 461 U.S. 95, 101-102 (1983). The Eleventh Circuit also relied on *Whitmore v. Arkansas,* 495 U.S. 149, 154 (1990) in addressing the standing issue.

As previously shown, the flaw in petitioners' argument is found in their effort to overcome the Eleventh Circuit's mooting of their claim. As Graham and Litras argue, " 'voluntary cessation of allegedly illegal conduct...does not make the case moot,' and 'a dispute over the legality of the challenged practices...may remain to be settled in such circumstances." Pet. pg. 7. What petitioners overlook is that there is no "allegedly illegal conduct" in the case at bar, and a dispute does not exist simply because a party desires one!

A case or controversy no longer existed after King (and Butterworth) represented that Graham's intended conduct was not implicated by the subject statute; neither did a case or controversy exist when the district court held that Graham's actions were outside the scope of the statute. The Eleventh Circuit's disposition of the case—that Graham and Litras had standing at the time the case was filed but not after subsequent events mooted the cause—is supported by this Court's decision in *Powell v. McCormick,* 395 U.S. 486, 496 (1969). Petitioners' view that a case or controversy exists—and they therefore have standing—entitling them to a decision on the merits of their First Amendment claim at the moment a prosecutor utters his or her initial belief as to the meaning and application of a statute, even if thereafter that prosecutor avers that this first blush view was incorrect, flies in the face of the standards this Court has espoused for case or controversy and standing conditions precedent.

The cases cited by Graham and Litras in support of their position involve allegations of illegal conduct, followed by the representation of no prosecution.[4] The absence of any

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4 In *ACLU v. The Florida Bar,* 999 F. 2d 1486 (11th Cir. 1993), it was the representation as to the constitutionality of the challenged provision of the Florida Code of Judicial Conduct which caused the Eleventh Circuit to hold that the possibility of prosecution nevertheless existed. The appeals court thus distinguishes that case with the one *sub judice.* See Pet. App. Pgs. 8a - 9a.

alleged illegal conduct, and multiple declarations that petitioners are outside the statute's embrace, render inapplicable their cited authorities; Graham simply does not face a threat of prosecution for his intended actions, see *Doe v. Bolton,* 410 U.S. 179, 188 (1973), and petitioners' protestations to the contrary simply do not make it so.

The further import of Graham's and Litras's claim is to have this Court depart from two well-settled principles: (1) construing statutes so as to avoid constitutional questions, and (2) not issuing advisory opinions.

The lower courts were faithful to this Court's view that a statute should be interpreted to avoid constitutional difficulty by undertaking a narrow, reasonable reading of the provision. *Osborne v. Ohio,* 495 U.S. 103 (1990); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council,* 485 U.S. 568 (1988); and that parties are not permitted to seek advisory opinions from federal courts. *Flast v. Cohen, supra*; see also *Buckley v. Valeo,* 424 U.S. 1 (1976). That Graham and Litras seek an advisory opinion that they may press their claim is most evident by their representation that even if they are not within the scope of the statute, they nevertheless have standing to challenge it on behalf of those who were governed by it. Pet. pg. 16. As the argument below makes clear, their overbreadth standing claim also is without merit.

II. The Eleventh Circuit's Decision that Petitioners Lack Overbreadth Standing is Consistent With Supreme Court Jurisprudence

There are three fallacies in petitioners' final argument. First, their bare claim—that anyone may challenge a statute on First Amendment grounds even if the provision does not affect the challenger—flies in the face of this Court's

admonition in *Board of Trustees, S.U.N.Y. v. Fox*, 492 U.S. 469, 484-85 (1989). In that case, this Court said:

> It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, *before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws.* (Emphasis added).

In the case *sub judice,* there was no "as applied" determination directed to Fla. Stat. § 105.071(11) precisely because petitioners were found to be outside of this provision's coverage. Therefore, the Eleventh Circuit properly refrained from adjudicating an overbreadth claim. Notwithstanding this Court's admonition and the Eleventh Circuit's adherence to it, Graham and Litras nevertheless seek to mount an impermissible "gratuitous wholesale attack() upon" this statute. This they cannot do.

Second, petitioners' overbreadth argument flows from the same flawed premise set out in Part I above; that somehow the prosecutor remains free to change his mind and decide to prosecute. Pet. pg. 15. In light of the statute's clear interpretation, this claim is meritless.

Third, at no time during the litigation did Graham or Litras seek to establish record evidence of the identity of those "persons who were governed by" the provision and adversely impacted by it. An overbreadth claim generally allows a challenger to proceed "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v. American*

Booksellers, Inc., 484 U.S. 383, 392-93 (1988). The two lower court decisions demonstrate that no such prediction or assumption was or can be made, and there is nothing in the record that implicates the notion "that the statute's very existence may cause others not before the court to refrain from" First Amendment-protected activities.

As these overbreadth cases make clear, there is a difference between declaring that a statute does not apply to a challenger and simply refraining from prosecution under a valid applicable statute. The latter may permit an overbreadth challenge; the former does not, as such a challenge presupposes a prima facie valid First Amendment "as applied" claim. Because, under the facts of this case, there is no such prima facie valid First Amendment claim, petitioners therefore seek an advisory opinion that they are permitted to maintain their challenge to a statute that does not affect either of them, and an advisory opinion on the statute's presumed impact on persons not before the court involving unspecified activity. These are clearly impermissible uses of the federal courts.

Petitioners rail against the Eleventh Circuit's "dangerous precedent" in not favorably ruling on the overbreadth claim. However, the dangerous precedent is the one petitioners seek to establish; that one not affected by the application of a statute nevertheless may press a constitutional overbreadth claim. The adoption of such an approach would wreak havoc with this Court's admonition in *Board of Trustees,* S.U.N.Y., 492 U.S. at 484-85, that courts not permit "wholesale attacks upon state...laws."

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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